IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 319

PACIFIC FAR EAST LINE, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, MARITIME ADMINISTRATION, and CLARENCE G. MORSE, MARITIME ADMINISTRATOR, *Respondents*,

MATSON NAVIGATION COMPANY, *Intervenor*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Pacific Far East Line, Inc. ("PFEL") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled case on May 1, 1958.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals (R. 638) is reported at 255 F.2d 182 (D.C. Cir., May 1, 1958). It is printed in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on May 1, 1958 (R. 638). A petition for rehearing was timely filed on May 16, 1958 (R. 642), and was denied on June 5, 1958 (R. 666, 667). The jurisdiction of this Court is invoked under 5 U.S.C. § 1046 (64 Stat. 1132).

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly held that upon a "plain meaning reading" of the term "Shipping Act, 1916, as amended", as used in the Review Act of 1950 (5 U.S.C. §§ 1031-1042), it lacked jurisdiction to review orders under the Merchant Marine Act, 1936 (46 U.S.C. §§ 1101-1294), notwithstanding that (1) the Merchant Marine Act, 1936, in fact amends the Shipping Act, 1916; (2) the legislative history of the Review Act (Appendix D) proves that Congress intended to include "all reviewable orders" of the Maritime Commission, Federal Maritime Board, and Maritime Administration[1] within the Review Act; (3) the terms "Shipping Act" and "Merchant Marine Act" have frequently been employed interchangeably by

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[1] The Federal Maritime Board and Maritime Administration, hereinafter the "Board" and "Administration", are related but separate agencies which succeeded to the functions of the former Maritime Commission under Reorganization Plan No. 21 of 1950. Appendix C, *infra*, contains extracts from Reorganization Plan No. 21, setting forth the respective functions of the Board and Administration.

The Shipping Act, 1916, created the United States Shipping Board, succeeded by the United States Shipping Board Bureau in 1933, under Executive Order of June 10, 1933, No. 6166, § 12, in turn succeeded by the Maritime Commission under the Merchant Marine Act, 1936.

Congress and agency officials (Appendix E); (4) the only judicially reviewable orders entered by the Maritime Administration are under the Merchant Marine Act, 1936; and (5) in any event, orders granting and denying relief under the 1936 Act are "entered under *authority* of the Shipping Act, 1916, as amended."[2]

2. Whether orders of the Maritime Administration are immune from review under the Review Act, notwithstanding that it expressly provides for review of "orders . . . of the Maritime Administration".

3. Whether orders entered by the Federal Maritime Board and Maritime Administration in rule-making proceedings involving provisions of the Shipping Act, 1916, are immune from review under the Review Act, notwithstanding the express provision in the Review Act for review of orders "entered under authority of the Shipping Act, 1916, as amended".

STATUTES INVOLVED

The statute principally involved is section 2 of the Review Act of 1950 (5 U.S.C. §§ 1031-1042) (also known as the Hobbs Act), set forth in Appendix A. Appendix A also includes sections 204, 805(a), 903 and 904 of the Merchant Marine Act, 1936 (46 U.S.C. §§ 1101-1294), and sections 23 and 31 of the Shipping Act, 1916 (46 U.S.C. §§ 801-842).

STATEMENT OF THE CASE

PFEL, a steamship company, applied for permission under section 805(a), Merchant Marine Act, 1936, to operate a new steamship service with unsubsidized vessels in domestic trade between the Pacific Coast of

[2] Emphasis has been supplied throughout this petition.

the United States and Hawaii (R. 639). Section 805(a), which is a "public interest and convenience" type statute, requires that any company who is a party to an operating-differential subsidy agreement under Title VI, Merchant Marine Act, 1936, or any affiliate, must obtain such permission prior to engaging in domestic trade operations. PFEL is a party to such an agreement with respect to a service in the foreign trade of the United States between California and Far East ports, which service is wholly separate from its proposed domestic Hawaii service (R. 3-5).

Pursuant to section 805(a), a statutory hearing was held upon PFEL's application by a Hearing Examiner of the Federal Maritime Board (R. 639). The application was opposed principally by intervener Matson Navigation Company ("Matson"), which has an approximately 98 percent monopoly of the cargo shipped between the Pacific Coast and Hawaii, and an almost complete monopoly of trade between the Atlantic and Gulf Coasts and Hawaii (under a pooling agreement with another carrier), and which is intimately related, by ownership and otherwise, with four of the so-called "Big Five", which are the dominant economic interests in Hawaii (R. 7, 9, 24-26, 637). Matson itself is a subsidized operator and subject to the restrictions of section 805(a), because it wholly owns Oceanic Steamship Company, which holds an operating-differential subsidy agreement for foreign trade operations between the Pacific Coast and Australia New Zealand. Matson itself manages and operates the Oceanic service. Matson nevertheless alleged that it was entitled to the special protection against competition afforded an "exclusively" domestic operator under section 805(a), and that PFEL's new service

would result in "unfair competition" to Matson, within the meaning of section 805(a) (R. 11, 13, 34).

The Examiner, after extensive hearings, held that PFEL's proposed service would not result in unfair competition to Matson, entered findings favorable to PFEL, including the finding that PFEL derived no benefit from subsidy not available to Matson through its own subsidized operations, and strongly recommended that PFEL's application be granted, as did also the Board's staff which actively participated in the proceeding as "Public Counsel" (R. 22-35). However, in a joint report served on May 14, 1957, the Board, by a two-to-one vote, and the Maritime Administrator,[3] rejected the Examiner's principal findings and recommendation, held that Matson was entitled to the special protection of an "exclusively" domestic operator under section 805(a), and that PFEL's competition would be "unfair" to Matson (R. 1-21).

PFEL thereupon filed its petition for review by the Court of Appeals for the District of Columbia, alleging jurisdiction under the Review Act of 1950 (R. 629-636). PFEL alleged, *inter alia*, that as a matter of law (1) Matson was not entitled to the special protection of an "exclusively" domestic trade operator under section 805(a), because of its subsidized operations; (2) the Board and Administration arbitrarily rejected the Examiner's findings and recommendation, without giving due weight thereto or any statement of reasons for its disagreement with those findings; (3) the critical findings upon which the Board and Administration purported to base their decision were

[3] The Chairman of the Federal Maritime Board is *ex officio* Maritime Administrator and head of the Maritime Administration.

not supported by substantial evidence; and (4) the Board and Administration failed to consider or make findings upon material issues, including the repugnancy of Matson's operations to the antitrust laws of the United States.

Because it had never been decided whether jurisdiction to review such agency action was in the Court of Appeals under the Review Act of 1950, or in the District Courts, PFEL also instituted a proceeding in the United States District Court for the District of Columbia.[4] That proceeding is pending in the District Court.

In the Court of Appeals proceeding, which is subject of the instant petition, respondents Board and Administration moved to dismiss the petition for review on the ground that orders under the Merchant Marine Act, 1936, are not subject to review by the Courts of Appeals under the Review Act. Concurrently in their answer filed in the District Court proceeding, they contended their action was not reviewable by any court.[5] Their declared strategy therefore is to defeat any judicial review whatever of their actions under the Merchant Marine Act, 1936. If this strategy is successful, they will have insulated from judicial review what is probably by far the greater portion of their activity.

Respondent United States concurred in the Board's motion to dismiss in the Court of Appeals, as did

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[4] Pacific Far East Line, Inc. v. Federal Maritime Board, et al., Civil Action No. 1708-57.

[5] *Id.*, Defendant's Answer, Fifth Defense; also Matson's Answer, Sixth Defense.

Matson, which had intervened in that proceeding. On October 11, 1957, the Court of Appeals, by Judges Prettyman and Burger and Chief Judge Edgerton, denied those motions, without prejudice to renewal at the hearing upon the merits (R. 637). The Board and Administration renewed their jurisdictional arguments at the hearing on the merits and Matson again concurred therein. Respondent United States admitted that the action of the Federal Maritime Board and Maritime Administration in denying PFEL's application was unlawful and ought to be reversed, but urged that jurisdiction in the first instance was in the district court.[6]

On May 1, 1958, the Court of Appeals by a second panel (Judges Miller and Bastian, and Chief Judge Edgerton) dismissed PFEL's petition for review for lack of jurisdiction, without reaching any consideration of the merits of the petition (R. 638-641). The Court, after preliminary recitals, stated only:

> "PFEL appeals from an order entered under authority of the Merchant Marine Act, 1936. It seems clear, from a 'plain meaning' reading thereof, that the Judicial Review Act of 1950 does not vest this court with jurisdiction to review this order, certainly not in the first instance. We do not find that this produces an unreasonable result, or one plainly at variance with the policy of the legislation as a whole, or that legislative history requires a different interpretation. Cf. *United States* v. *American Trucking Assn's*, 310 U.S. 534, 543.
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> "PFEL has filed a companion suit in the District Court seeking review of the same order. We

[6] Addendum to Brief of Respondent United States in the proceeding below.

of course, express no opinion as to the jurisdiction of that court" (R. 640-641).

The Court did not otherwise discuss or refer to PFEL's contentions or to the very considerable evidence in support thereof.

REASONS FOR GRANTING THE WRIT

This case presents questions of substantial public interest which warrant review by this Court. In express terms and in effect the decision below exempts from review under the Review Act of 1950 (1) all orders under the Merchant Marine Act, 1936, the administration of which comprises the principal activity of the Board and Administration; (2) all orders of the Maritime Administration, notwithstanding the express provision in the Review Act for review of "orders of the . . . Maritime Administration"; and (3) all orders entered by the Board pursuant to its general rule making power, including those with respect to the substantive provisions of the Shipping Act, 1916, notwithstanding the express provisions in the Review Act for review of orders "entered under authority of the Shipping Act, 1916, as amended." Moreover, under the decision below, the Board and Administration have achieved one branch of their declared two-pronged objective to completely immunize from judicial supervision all of their actions under the Merchant Marine Act, 1936[7]—including action

[7] The Board derives its general rule-making authority from section 204, Merchant Marine Act, 1936. In the Matter of the Notice of Proposed Rule Making—Business Practices of Freight Forwarders [46 C.F.R. Part 244], Report of the Federal Maritime Board on Petition to Dismiss, served August 21, 1957, Letter pages 2-3.

which, in this instance, the Department of Justice has categorically asserted were unlawful.

The holding by the Court of Appeals that the Review Act of 1950 "plainly" does not authorize review of orders under the Merchant Marine Act, 1936, was erroneous and in conflict with compelling evidence to the contrary.

The objectives of Congress in enacting the Review Act included provision for a uniform procedure for review in the Courts of Appeals of orders of the various agencies specified, including the former Maritime Commission, the Federal Maritime Board, and the Maritime Administration. Senate Report No. 2618, 81st Cong., 2d Sess. (1950), stated:

> "At present the method of review of most judicially reviewable orders of the agencies involved in the proposed bill is prescribed by many provisions scattered throughout different statutes . . . The proposed bill confers jurisdiction upon the circuit courts of appeals to review the orders of the agencies named" (page 3).

The Board and Administration urged below and presumably the Court of Appeals concurred in the highly technical construction that the Review Act in terms refers only to the "Shipping Act, 1916, as amended", and therefore does not apply to the integrally related Merchant Marine Act, 1936. But the 1936 Act in fact is included in the 1916 Act, "as amended". The 1936 Act not only amends the basic shipping laws of the United States first enacted in the Shipping Act, 1916,[8] but it also expressly amends the 1916 Act in

[8] For example, see Preamble, Shipping Act, 1916, 39 Stat. 728; Preamble, Merchant Marine Act, 1936, 49 Stat. 1985; section 101, Merchant Marine Act, 1936, 49 Stat. 1985, 46 U.S.C. § 1101.

numerous detailed respects. For example, sections 204 and 904 of the 1936 Act amend the 1916 Act generally by substituting the Maritime Commission for its predecessors, the Shipping Board and Shipping Board Bureau, and by transferring to the Commission each of the functions, powers and duties formerly vested in its predecessors. The 1936 Act also amends the 1916 Act by repealing sections 3, 4, 5, 6, 7, 8, 10, 11, 35, and 43 thereof.[9] Section 903(b) of the 1936 Act also amends section 3 of the Intercoastal Shipping Act, 1933, which is likewise part of the "Shipping Act, 1916, as amended". See the preamble to the 1933 Act (47 Stat. 1425, approved March 3, 1933). And section 204 of the 1936 Act, as elsewhere herein noted, empowered the Commission, and hence the Board and Administration, to promulgate rules and regulations under the provisions of the 1916 Act.

While the terms "Shipping Act" and "Merchant Marine Act" are frequently separately employed, Appendix E, *infra*, proves that there has nevertheless been considerable inconsistency, overlapping and interchange in terminology, both by Congress and by agency officials. The Chairman of the Board has himself referred to the 1936 Act as one of the "shipping acts", as has the Congress (Appendix E). The Court of Appeals thus unjustifiably held Congress to a far greater degree of precision in language than Congress and the Board have hitherto employed.

It is plain from the very language of the Review Act that Congress covered the Merchant Marine Act, 1936, in its reference to the "Shipping Act, 1916, as amended", since it expressly included in the Re-

[9] See section 903 of the 1936 Act.

view Act "orders . . . of the Maritime Administration". The only reviewable orders issued by the Maritime Administration are those issued under the Merchant Marine Act, 1936. The Maritime Administration's functions under the 1916 Act (if the 1936 Act be excluded) are confined to sections 9, 37-40, 42, all of which relate to the sale or transfer of vessels from U. S.-flag ownership or registry to foreign-flag ownership or registry, and none of which have ever been held to be reviewable.[10] The unnecessarily technical and narrow construction below, therefore, in effect judicially repeals the specific provision in the Review Act for review of "orders . . . of the Maritime Administration". To give the quoted language any meaning, the Review Act must be construed to cover 1936 Act orders.

The legislative history of the Review Act also demonstrates that orders under the 1936 Act were covered thereby. See Appendix D, *infra*. During legislative consideration of the Review Act, two representatives of the Maritime Commission repeatedly urged that the Act should apply to "all reviewable orders" of the Maritime Commission. They proposed language the "minimum effect" of which they represented "should be the substitution of the new procedure for the old with respect to all reviewable orders of the Commission" (Hearings before Subcommittee Nos. 3 and 4 of

[10] The Federal Maritime Board and Maritime Administration unqualifiedly assert that the exercise of such functions is not judicially reviewable. Thus, their brief below at pages 11-16 states that orders "fraught with discretion, business judgment, considerations of international and defense policy and other purely executive concerns", as orders under sections 9, 37, 40-42 clearly are, are not subject to judicial review.

the House Committee on the Judiciary on H. R. 1468, H. R. 1470, and H. R. 2271, 80th Congress, and before Subcommittee No. 2 on H. R. 2915 and H. R. 2916, 81st Congress ("Providing for the Review of Orders of Certain Agencies, etc.")). Congress adopted this language verbatim.

Had Congress intended to exclude judicially reviewable orders under the Merchant Marine Act, 1936, from coverage of the Review Act, some reason for such exclusion would logically be expected. No reason therefor is to be found in the legislative history.

But even assuming, *arguendo*, that the narrow construction below was proper, *i.e.*, that the 1936 Act is not part of the "Shipping Act, 1916, as amended", nevertheless the holding of the Court of Appeals that it lacked jurisdiction was still erroneous. Thus, the Review Act provides for review of orders "entered under *authority* of the Shipping Act, 1916, as amended". Orders granting or denying relief under the 1936 Act are "entered under authority of the Shipping Act, 1916, as amended", because they are subject to section 23 of the 1916 Act, as amended.[11] See also section 31 of the 1916 Act.

Finally, the holding below is germinating the seed of conflict. In *Richfield Oil Corp.* v. *United States*, 207 F. 2d 864, 869, note 6a (1953), the Ninth Circuit suggested, without deciding, that the reference in the Review Act to orders of the Maritime Administration

[11] Section 23 provides in part that "All orders . . . under this Act, as amended or *supplemented*, shall continue in force until its further order, or for a specified period, as shall be prescribed in the order . . ."

contemplated review by the Courts of Appeals far broader than (but including) the review sought below by petitioner.

Until the questions presented are definitively resolved, they will be present in practically every future proceeding in which judicial review is sought of agency action under the Merchant Marine Act, 1936, or of any agency action by the Maritime Administration, or of any action pursuant to the Board's general rule-making powers. A party aggrieved by agency action under the Merchant Marine Act, 1936, can fully protect its right to review only by instituting duplicate proceedings in both the Court of Appeals under the Review Act and in the District Court—which, from the standpoint of the courts, the agencies and private litigants, is a costly and wholly wasteful procedure.

CONCLUSION

In view of the foregoing, petitioner respectfully urges that the writ be granted.

Respectfully submitted.

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